

**Evidence Rules Advisory Committee
Minutes of Meeting on March 27, 2011**

Present: Judge Karen Lansing, Chair; John Janis, Wyatt Johnson, Jessica Lorello, Michelle Points, Judge Terry McDaniel, Michael Gaffney, Scott Andrew, Doug Mushlitz, Fred Hoopes, Tim Gresback, Steve Smith, and Cathy Derden.

Guests: Sarah Scott, Project Director for the Idaho Coalition against Sexual and Domestic Violence; LaDessa Foster, Associate Director and licensed clinical professional counselor; Jennifer Landhuis, Program Manager, and Dr. Lisa Bostaph, Academic Advisor on grant projects.

Advocate – victim privilege. In January the Committee met to discuss a proposal by the Idaho Coalition against Sexual and Domestic Violence to add a rule providing an advocate-victim privilege. The Committee voted against the proposal at that time; however, due to a communication error, no representative of the Coalition had been there to present the proposal. Therefore the Committee met again to review a revised proposal by the Coalition with members of the Coalition there to present the proposal and answer questions.

The revised rule stated:

Rule _____. Advocate-Victim privilege.

(a) Definitions. As used in this rule:

(1) Victim. A "victim" is a person who is seeking advice, counseling, or assistance for alleged acts of domestic violence and/or sexual assault.

(2) Advocate. An "advocate" is any person who is employed by or a volunteer at a domestic violence victims' program or rape crisis organization or a comparable community-based advocacy program for victims of domestic violence and/or sexual assault (A) whose primary function is to render advice, counseling, or assistance to victims of domestic violence or sexual assault, or reasonably believed by the victim so to be, and (B) who has undergone not less than thirty hours of training as an advocate of a victim of domestic violence or sexual assault, which training shall include, but not be limited to, the dynamics of battering, the dynamics of victimization, substantive laws relating to violent crime, sexual assault, and domestic violence, crisis intervention techniques, communication skills, working with diverse populations, an overview of the state criminal justice system, information regarding pertinent hospital procedures, and information regarding state and community resources for victims of crime, or has been an advocate at a domestic violence victims' program or rape crisis organization or a comparable community-based advocacy program for victims of domestic violence and/or sexual assault for not less than three years. An "advocate" does not include a person who is employed by any law enforcement or prosecutorial agency.

(3) Confidential communication. A communication is "confidential" if not intended to be disclosed to third persons except persons present to further the interest of the victim in the consultation, examination, or interview, or persons reasonably necessary for the transmission of

the communication, or persons who are participating in the rendition of advocacy services to the victim under the direction of the advocate, including members of the victim's family.

(b) General rule of privilege. A victim has a privilege in any civil or criminal action to which the victim is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of advocacy services to the victim, among the victim, the victim's advocate, and persons who are participating in the advocacy services under the direction of the advocate, including members of the victim's family.

(c) Who may claim the privilege. The privilege may be claimed by the victim, or for the victim through the victim's advocate, lawyer, guardian or conservator, or the personal representative of a deceased victim. The authority of the advocate, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Civil action. In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

(2) Proceedings for guardianship, conservatorship or hospitalization. As to a communication relevant to an issue in proceedings for the appointment of a guardian or conservator for a victim for mental illness or to hospitalize the victim for mental illness.

(3) Child related communications. In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition, of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

(4) Contemplation of crime or harmful act. If the communication reveals the contemplation of a crime or harmful act.

Areas of previous concern were addressed by members of the Coalition. The first was that advocates are not professionals and are not governed by a code of ethics. It was pointed out that the program is governed by a state agency, the Idaho Council on Domestic Violence, and has a number of standards it must follow. This includes personnel standards that require specific training. In fact, many persons working as advocates have a bachelor's or a master's degree. There are also confidentiality requirements that are mandated by the federal funding received.

It was explained that there are twenty-seven member programs that provide assistance. Most of the people who come to these programs are without significant financial resources and thus do not have the option of seeking help from an attorney, licensed professional counselor, or other licensed professional to whom communications would be protected by an existing privilege. These persons want to be able to talk freely to the advocate without fear their statements may one day be disclosed. Thus, an economic disparity was pointed out to demonstrate that those persons who cannot afford to seek help from a licensed professional risk having their communications disclosed while those with better financial resources do not share this risk.

In addition, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful advocacy. The Coalition asserts that without assurances that communications made during the advocacy relationship will be confidential and protected from disclosure, victims will be even more reluctant to seek advocacy, shelter and safety, to confide openly to their advocates, and to explore legal and social remedies fully. Most of the programs do not have someone on staff who is a licensed professional that would hold a privilege. Several examples were given of cases where a program received a subpoena for its records regarding a person who had sought services. There was concern that records hold information regarding safety planning and that such information should be protected. Particularly troublesome was the risk that a client could be endangered by disclosure to an abuser of the client's residence address or place of employment. It was noted that advocates are sometimes taught to keep scarce notes because there is no privilege and that this can be a disservice to the victim.

The Committee noted that if an advocate receives a subpoena for records that contain personal information a protective order could be sought. While this would require hiring an attorney, the assertion of the privilege would likely also involve an attorney.

The Committee discussed various sections of the rule and changes that could be made to make the rule more agreeable. The use of the term "victim" and the fact that it predetermines that the person is in fact the victim of a crime had been a concern. The Coalition revised the term to define victim as a person seeking services but there was still discussion as to whether the person should be identified as a client. There was also a suggestion to eliminate the detailed training set out in section (2) and instead state the person must meet the domestic violence personnel standards set out by the Idaho Council on Domestic Violence. It was also noted that the victim is not a party when it is a criminal proceeding such that some language would have to be changed in subsection (3) of the revised rule.

After the members of the Coalition departed, each member of the Committee was given a chance to voice an opinion as to the adoption of the rule. The vote was three in favor of the rule with the corrections discussed, five opposed and three who were opposed but willing to consider it if even more changes were made; for example, some kind of balancing test left to the court as in a similar California rule. Those who voted against the proposal made it clear that while they applauded the work done by the advocates, they were against the rule in principle and the expansion of privileges.

Rule 512 (a). In its recent decision in *Matter of John Doe*, 2011 Opinion No. 23, February 25, 2011, the Idaho Supreme Court stated:

We note that it is generally permissible in civil cases to make inferences against someone who invokes her Fifth Amendment rights. *See Baxter v. Pamigiano*, 425 U.S. 308, 318–19 (1984) (holding that prison officials could draw reasonable inferences from prisoner's silence in prison disciplinary proceeding case, because such a case is not criminal in nature).

Idaho Rule of Evidence 512(a) currently states: “The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. *No inference may be drawn therefrom.*” (Italics added.)

It was proposed that the rule be amended to clarify that the purpose of Rule 512(a) is to prevent drawing inferences from invocation of the privileges that are provided in the Evidence Rules, e.g., the attorney/client privilege or the physician/patient privilege, and that it does not prevent drawing an inference from the invocation of a constitutional privilege in cases where that would otherwise be allowed. The Committee voted in favor of the following proposed language:

Rule 512. Comment upon or inference from claim of privilege; instruction.

(a) Comment or inference not permitted. “The claim of a any privilege created in these rules, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and ~~N~~no inference may be drawn therefrom.”